

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

ISRAEL TORRES-AVILES a/k/a ISREAL
TORRES-AVILES,

Defendant-Appellant.

UNPUBLISHED

March 16, 2001

No. 218029

Van Buren Circuit Court

LC No. 98-010958-FC

Before: Saad, P.J., and Fitzgerald and O'Connell, JJ.

PER CURIAM.

Defendant appeals as of right his bench trial conviction of second-degree murder, MCL 750.317; MSA 28.549, assault with intent to commit murder, MCL 750.83; MSA 28.278, and possession of a firearm during the commission of a felony, MCL 750.227b; MSA 28.424(2). The trial court sentenced defendant to concurrent terms of eight to twenty-five years' imprisonment for the murder conviction, and five to twenty-five years' imprisonment for the assault conviction, with both sentences running consecutive to a mandatory two-year term for the felony-firearm conviction. We affirm.

Defendant claims on appeal that he was denied the effective assistance of counsel. Because defendant did not move for a new trial or a *Ginther*¹ hearing, our review is limited to errors apparent from the record. *People v Henry*, 239 Mich App 140, 146; 607 NW2d 767 (1999). To establish a claim of ineffective assistance of counsel, a defendant must show that counsel's performance fell below an objective standard of reasonableness, and that he was prejudiced to the extent that it denied him a fair trial. *People v Pickens*, 446 Mich 298, 302-303; 521 NW2d 797 (1994).

To demonstrate prejudice, defendant must show that there is a reasonable probability, but for counsel's deficient performance, that he would not have been convicted. *Henry, supra* at 146. Further, defendant must overcome the presumption that counsel's conduct was the product

¹ *People v Ginther*, 390 Mich 436, 443; 212 NW2d 922 (1973).

of sound trial strategy. *People v Toma*, 462 Mich 281, 302; 613 NW2d 694 (2000). As a preliminary matter, we note that the questioning of witnesses is presumed to be a matter of trial strategy. *People v Rockey*, 237 Mich App 74, 76; 601 NW2d 887 (1999). We will not second-guess defense counsel's trial strategy with the benefit of hindsight. *People v Rice (On Remand)*, 235 Mich App 429, 445; 597 NW2d 843 (1999).

On appeal, defendant challenges defense counsel's cross-examination of the prosecution's eyewitnesses. Defendant first asserts that defense counsel's cross-examination of the witnesses improperly elicited evidence that animosity existed between two rival gangs. Defendant further argues that the cross-examination effectively linked him to membership in one of the feuding gangs. According to defendant, this evidence raised the inference that defendant had a motive to participate in the shooting that injured one victim and resulted in the death of another. We disagree.

Our review of the record as a whole demonstrates that defense counsel repeatedly attempted to demonstrate through cross-examination that defendant did not have any prior involvement in gang activity, and that individuals alleged to be gang members were not familiar with defendant. Moreover, in our view, any reference to gang tension was aimed at showing that defendant's codefendant was a gang member, and that he, rather than defendant, had the motive to shoot the victims.

Defendant also claims that counsel improperly elicited testimony concerning defendant's confrontation with the victims at a party store shortly before the shooting during his cross-examination of one of the witnesses. We disagree. The record is clear that this information was not brought forth initially by defense counsel. Rather, defense counsel was merely restating testimony elicited during direct examination as he attempted to impeach the credibility of the witness.

Moreover, we reject defendant's argument that defense counsel's cross-examination of one of the eyewitnesses improperly demonstrated that defendant was responsible for the shootings. Specifically, defendant contends that defense counsel's cross-examination of the witness implicated defendant in the shooting because it showed that defendant had a gun in his hand when the victims were shot.

Our review of the record indicates that the fact that defendant was in possession of a gun was first elicited during direct examination by the prosecutor. In addition, after reviewing defense counsel's questioning of the witness in context, it is evident that he was properly attempting to impeach the credibility of the witness by calling attention to discrepancies between the witness' trial testimony and his prior statement to police.

Our review of the record convinces us that these alleged mistakes were valid decisions made pursuant to a strategy aimed at discrediting the prosecution's witnesses. We are satisfied

that counsel's performance was not deficient.

Affirmed.

/s/ Henry William Saad
/s/ E. Thomas Fitzgerald
/s/ Peter D. O'Connell